# STATE OF MICHIGAN

# COURT OF APPEALS

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| MCDONALD BUILDERS, INC. and FLOYD CHARLES MCDONALD,<br><br>Petitioner-Appellee, | UNPUBLISHED<br>June 22, 2006 |
| v | No. 259557<br>Gladwin Circuit Court |
| DEPARTMENT OF LABOR AND ECONOMIC GROWTH,<br><br>Respondent-Appellant. | LC No. 04-001447-AA |

Before: Smolenski, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

In this licensing action, respondent Department of Labor and Economic Growth appeals by leave granted the trial court's order remanding this matter to the Board of Residential Builders and Maintenance Contractors (the board) for modification of penalties imposed by the board against petitioners. We reverse.

## I. Basic Facts and Procedural History

In July 2000, petitioner McDonald Builders, Inc. entered into a contract with Barbara Manier for the extensive remodeling of a home. Apparently unhappy with the manner in which McDonald had performed the contract, Manier filed suit against the company in April 2001. Manier subsequently contacted respondent with complaints of poor workmanship and a failure by McDonald to adhere to the state building and occupational codes. After investigating the matter and obtaining a building inspection report detailing numerous defects in workmanship and violations of the state building code, respondent filed a formal complaint against McDonald Builders and its qualifying officer, petitioner Floyd McDonald, in October 2002. In its complaint, to which it attached a copy of the building inspection report, respondent alleged that petitioners had violated various provisions of both the occupational code and the administrative rules applicable to residential builders by committing an act of incompetence, MCL 339.604(g), willfully departing from or disregarding plan specifications, MCL 339.2411(2)(d), willfully violating state building laws, MCL 339.2411(2)(e), failing to perform the requirements of the contract in a workmanlike manner, MCL 339.2411(2)(m), and failing or refusing to correct a complaint within a reasonable time, 1979 AC R 338.1551(4).

The following month, petitioners and Manier reached an agreement to settle the civil suit, under which petitioners would complete or repair a number of items under the supervision of an "owner's representative" skilled in the building trade. However, despite the apparent resolution of the civil suit,[1] the licensing action initiated by respondent continued and a hearing on the matter was held before an administrative law judge in June 2003. Although petitioners failed to appear for the hearing, the administrative law judge elected to proceed with the matter after concluding that petitioners had been properly served with notice of the hearing. At the hearing, respondent provided the administrative law judge with a number of exhibits, including an engineering report detailing numerous structural defects, many of which were substantial and violative of the state building code, and had resulted in significant damage to the home. Respondent also provided the administrative law judge with an estimate for repair of the home, as well as more than thirty photographs depicting structural and cosmetic deficiencies in the work performed by petitioners. At the conclusion of the hearing, the administrative law judge inquired as to the status of the civil litigation involving Manier and petitioners, and was informed that suit was in the process of being "closed out."

In July 2003 the administrative law judge issued a hearing report setting forth his findings and conclusions of law following the hearing. In his report, the administrative law judge indicated that petitioners had been served with notice of the hearing but had failed to appear, and that he therefore found by default that the allegations of code and rule violations contained in the complaint were true. Based on the exhibits provided to him at the hearing, the administrative law judge then recommended a fine of $1,250 and restitution in favor of Mainer in the amount of $32,500.

In a final order dated February 26, 2004, the board adopted the findings and conclusions of law set forth by the administrative law judge in the hearing report. The board also adopted the administrative law judge's recommendation of restitution in favor of Mainer in the amount of $32,500. However, noting "the severity of the violations, particularly incompetence and willful violation of building laws," the board opted to impose a fine of $10,000, and to also suspend petitioners' residential builders license until payment of both the fine and restitution.

Petitioners thereafter filed the instant petition for review by the circuit court, arguing that the board's decision was "arbitrary and also unreasonable as [it] failed to consider all of the evidence in this matter," in particular, that the parties had agreeably settled the civil litigation. On review, the trial court concluded that the record was sufficient to permit the board to determine that the violations alleged in respondent's formal complaint had in fact occurred. The court also concluded, however, that because the board was aware that petitioners had settled the civil suit with Manier, there was "no legal or factual basis for ordering restitution in this case." Thus, noting further that to order restitution under such circumstances would result in an

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[1] We note that although the trial court approved settlement of the civil suit in November 2002, an order to that effect was not presented to the court, and was thus not entered, until February 2003. We further note that while the consent judgment entered by the trial court required that a satisfaction of judgment be entered by the court upon satisfactory completion of the agreed to work, no such satisfaction is contained in the record before this Court.

"unlawful double recovery," the court found that the board abused its discretion in ordering restitution. Consequently, the court remanded the matter to the board with instructions to vacate that portion of its final order requiring restitution.

The court also found that because the administrative law judge did not find, and the board did not articulate, any "incompetence or willful violation[s]" by petitioners, the board's "departure" from the administrative law judge's recommended fine was not supported by competent, material, and substantial evidence, and thus also ordered that, "[o]n remand, the [administrative law judge's] recommended fine of $1,250.00 shall be reinstated." This Court subsequently granted respondent's application for leave to appeal the trial court's rulings in these regards.

## II. Analysis

On appeal, respondent argues that the trial court erred in ordering that the board decrease the fine imposed by it against petitioners and that it vacate its order of restitution. We agree.

"A circuit court's review of an administrative agency's decision is limited to determining whether the decision was contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary and capricious, was clearly an abuse of discretion, or was otherwise affected by substantial and material error of law." *Dignan v Michigan Pub Sch Emp Retirement Bd*, 253 Mich App 571, 576; 659 NW2d 629 (2002), citing Const 1963, art 6, § 28; see also MCL 24.306. This Court reviews a circuit court's review of an agency decision to determine whether the lower court "applied the correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings. *Boyd v Civil Service Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996). "Substantial evidence is the amount of evidence that a reasonable person would accept as being sufficient to support a conclusion; it may be substantially less than a preponderance of the evidence." *Wayne Co v Michigan State Tax Comm*, 261 Mich App 174, 186-187; 682 NW2d 100 (2004).

We find that the trial court failed to apply the correct legal principles when it held that the board's decision to impose a fine greater than that recommended by the administrative law judge was not supported by competent, material, and substantial evidence. Initially, we note that the board was not required to accept the recommendation of the administrative law judge regarding the amount by which petitioners should be fined. As recognized by this Court in *Arndt v Dep't of Licensing*, 147 Mich App 97, 104; 383 NW2d 136 (1985), a hearing examiner has no authority to assess a penalty and any such recommendation by the examiner "[is] just that, a recommendation." Rather, sole authority to assess such penalties is vested in the board. *Id.*; see also MCL 339.602 (setting forth the penalties that may be imposed for violation of the occupational code) and MCL 339.513 (providing that a "hearing report may *recommend* the penalties to be assessed as prescribed in article 6") (emphasis added).

We additionally note that the trial court's ruling that because there was no finding by the administrative law judge that the violations at issue here were severe or willfull, the board's decision to impose a fine greater than that recommended by the administrative law judge on the basis of such facts was not supported by the evidence, runs contrary to the understanding that judicial review of an agency determination is of the agency's final decision, not of a hearing

referee's proposal for decision or of the agency's decision to reject that proposal. *Dignan*, *supra* at 576-578. The final decision to be reviewed by the trial court was the board's determination to impose a fine of $10,000, the maximum permissible under MCL 339.602(e), and it is irrelevant that the administrative law judge recommended a contrary position. See *Dignan*, *supra* at 577-578 ("the circuit court . . . erroneously elevated the hearing referee's proposed findings to the status of a final decision"). Rather, all that matters is "whether the position adopted by the [board] is supported by evidence from which legitimate and supportable inferences were drawn." *McBride v Pontiac School Dist*, 218 Mich App 113, 123; 553 NW2d 646 (1996). Thus, in reviewing the board's decision, the circuit court was required to affirm so long as the decision was supported by competent, material and substantial evidence, even if the court "might have reached a different result had it been making the initial decision." *Arndt*, *supra* at 101. The court was also required to refrain from decreasing the penalty imposed by the board unless it could be said that the board abused its discretion in imposing a penalty authorized by statute. See *Marrs v Bd of Medicine*, 422 Mich 688, 695; 375 NW2d 321 (1985). After review of the record, we find no basis upon which the trial court could conclude that the fine imposed by the board was not properly supported by the record.

As previously noted, the board indicated that its decision to impose a fine of $10,000 was premised on "the severity of the violations, particularly incompetence and willful violations of building law[s]." These bases were clearly supported by "competent, material and substantial evidence on the whole record," as required by MCL 24.306(1)(d). As noted above, the formal complaint, which was supported by an attached building inspection report detailing numerous workmanship and building code deficiencies, specifically alleged that petitioners willfully violated state building laws and departed from or disregarded plan specifications. These allegations, which were taken as true by the administrative law judge following petitioners' failure to appear at the hearing, and which were further supported by photographs and an independent engineering report detailing the extensive damage resulting from petitioners' code violations and plan departures, were sufficient to support the board's conclusion that the violations at issue were both severe and willful. See *Boyd*, *supra* at 235.

Further, there is no basis for finding that the board abused its discretion by imposing the maximum fine permissible. An agency abuses its discretion in assessing a penalty only when its decision is "'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.'" *Marrs*, *supra* at 694, quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959). Because a circumstance involving willful violation of building laws resulting in significant structural and cosmetic deficiencies in a residential structure is reasonably viewed as warranting the maximum fine permitted by statute, it cannot be said that the board abused its discretion by assessing such fine in this case. *Arndt*, *supra* at 104.

Moreover, because the board possessed the authority to order restitution, see MCL 339.602(h), the trial court erred in concluding that there was no legal or factual basis from which to assess such a penalty. That a mutually agreeable resolution to the problems that sparked the formal complaint may have been reached through civil litigation did not, as the trial court found, preclude an administrative order of restitution. As we have already discussed, the board has authority to impose penalties, *Arndt*, *supra*, including restitution, and although the trial court is correct that double recovery is not permissible, see *Great Northern Packaging, Inc v Gen Tire &*

*Rubber Co*, 154 Mich App 777, 781; 399 NW2d 408 (1986), it is not disputed by respondent that petitioners would be entitled to offset any satisfaction of the restitution order inuring to Manier through the civil litigation. This right of offset, however, did not deprive the board of its statutory right to impose restitution as part of the licensing action. *Arndt*, *supra*; MCL 339.602(h).

Reversed.

/s/ Michael R. Smolenski
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray